

ORIGINAL

Supreme Court, U.S.

FILED

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JOSEPH F. SPANOL, JR.

CLERK

In the Supreme Court of The United States

October Term, 1979

No. 87-725

Michael Cutillo and Robert Nunez,
Petitioners

v.

Arthur J. Cinelli
Respondent

On A Petition For A Writ Of Certiorari To The United States Court
of Appeals For the First Circuit

Memorandum For (The Respondent)
In Opposition

Petitioners contend that the United States Court of Appeals for the First Circuit erred in ruling that once the respondent-plaintiff had shown the disclosure of defense information during the interrogation of the defendant, the burden shifted to the government to show that there was no prejudice to the defendant. (Pet. 7-8;) (Pet.App. 8A, 820 F.2d 478)

LAW OFFICES
McCORMICK & MAITLAND
ONE-FORTY-FOUR
MAIN STREET
COUNTRY CROSSING
P.O. BOX 316
NORFOLK, MA 02056
AREA CODE 617
560-0333

STATEMENT OF THE CASE

The facts are, for the most part, not in dispute. In support of their Motions for Summary Judgment, Cutillo and Nunez submitted a transcript of Cinelli's hearing on a Motion to Dismiss which took place in the Superior Court Department of the Massachusetts Trial Court. Appellees, also relied upon that Court's findings of fact and the decision of the Supreme Judicial Court affirming the Superior Court's denial of Cinelli's Motion to Dismiss. (Pet.App. 18A-25A; 26A-38A)

On May 7, 1981, the appellant Cinelli was arrested and charged with armed robbery and assault with intent to murder. Later that day, he was arraigned in the Somerville District Court, where he was represented by court-appointed counsel. On May 8, Cinelli appeared at a bail review hearing in the Middlesex Superior Court. At this time he was represented by Edward J. McCormick, III, who has remained his counsel since that time.

Unable to post bail, Cinelli was incarcerated at the Billerica House of Correction in an isolation section of the facility.

On May 12, 1981, Detective Michael Cutillo claims to have received an anonymous telephone call from an individual who indicated that Cinelli wished to speak with him. At the time of the alleged call, Cutillo had played only a limited role in the investigation of the armed robbery. However, Cutillo, in his

capacity as a uniformed police officer, had known the defendant for a number of years, and the relationship between Cutillo and Cinelli on May 12, 1981 could properly be characterized as hostile.

At that point Detective Cutillo contacted the Medford Police Department to inquire as to whether there was any objection to his going to the jail to interrogate Mr. Cinelli. Cutillo was advised that Medford had no objections and with Detective Nunez, proceeded to Billerica jail.

Mr. Cinelli was at the time being held in solitary confinement, more commonly known as the hole. The defendant's cell was dark, his bed had no sheets or blankets and the defendant was fed inside his cell.

The defendant was allowed no phone calls, but he was permitted out of the cell for one hour a day to see visitors, who included his mother and a friend named Rocco Costa.

As the defendant was taken from his cell the evening of May 12, just before he was brought down to the reception area where Detective Cutillo and Nunez were waiting, the defendant was presented with a waiver sheet on which the detectives had printed their names. The Defendant was told that two Revere police officers were there to see him, that the defendant did not have to talk with them, and that the defendant was entitled to have his lawyer present if he wished to speak with the detectives.

LAW OFFICES
MCCORMICK & MAITLAND
ONE-FORTY-FOUR
MAIN STREET
COUNTRY CROSSING
P.O. BOX 318
NORFOLK, MA 02096
AREA CODE 617
520-0338

LAW OFFICES
MCCORMICK & MAITLAND
ONE-FORTY-FOUR
MAIN STREET
COUNTRY CROSSING
P.O. BOX 318
NORFOLK, MA 02096
AREA CODE 617
520-0338

The defendant looked at the waiver sheet for approximately twenty to thirty seconds and appeared to be reading it. In relevant part the waiver form (i.e. Exhibit 1, appended) states:

"TO THE INMATE"

Under your constitutional rights you do not need to talk to any officer without your lawyer being present. Whether you talk to the above officer(s) or official(s) or not, please indicate and sign".

After this statement on the waiver form, two short sentences and signature blanks appear. One sentence reads: "I will voluntarily talk to the above official(s)", and the other says, "I will not voluntarily talk to the above official(s)". The Defendant then signed the waiver indicating that he would voluntarily talk to the detectives.

At that point he was escorted to the reception area where he met Cutillo and Nunez. The detectives and the defendant were then left alone to speak in private.

The substance of the conversation which thereafter ensued is not substantially in dispute. The defendant maintained his innocence, steadfastly denying any involvement in the armed robbery and indicating that he had an alibi. The detectives told Cinelli that the case against him appeared to be strong, that no lawyer would be able to help him, that he would spend up to a year in jail awaiting trial, that he could receive a life sentence if convicted, and that he would benefit by cooperating

with the police in identifying the other participants in the crime. The detectives also informed Cinelli that if he did not commit the armed robbery, they did not wish to see him convicted, and that if he was not guilty, he should give the detectives any information that could be helpful in establishing his innocence. Cinelli replied that he had friends on the street who were trying to find out who committed the robbery and identified two of them named Costa and Lightbody. At Cinelli's request, the detectives permitted Cinelli, in their presence, to telephone Costa and Lightbody. He advised them that they could speak to Cutillo if they wished. Within days after this interrogation Costa was indicted and renamed as a co-defendant.

At the time of the May 12 conversation, Cutillo and Nunez had reason to believe Cinelli was represented by counsel and knew that he had the right to have counsel present during the interview. The detectives' purpose in visiting Cinelli was to see if he would cooperate with the police investigation, although they went to Billerica believing Cinelli had asked to see them. At some point during the conversation, Cinelli asked where his lawyer was and suggested that his lawyer should be present. Both detectives deny having known the identity of Cinelli's counsel, and did not attempt to identify or locate Cinelli's attorney before or during the May 12th meeting. (Pet.App.26A-38A).

Cinelli filed an action pursuant to 42 U.S.C. §1983

LAW OFFICES
MCCORMICK & MAITLAND
ONE-FORTY-FOUR
MAIN STREET
COUNTRY CROSSING
P.O. BOX 318
NORFOLK, MA 02056
AREA CODE 617
520-0335

LAW OFFICES
MCCORMICK & MAITLAND
ONE-FORTY-FOUR
MAIN STREET
COUNTRY CROSSING
P.O. BOX 318
NORFOLK, MA 02056
AREA CODE 617
520-0335

claiming damages for the police misconduct depriving him of his Constitutional rights as guaranteed by the Sixth and Fourteenth Amendments. The United States District Court granted summary judgment finding there was no issue of genuine fact in dispute and that Cinelli had not established prejudice. The United States Circuit Court of Appeals for the First Circuit reversed the District Court holding that there did exist genuine issues of fact and that it was erroneous to place the burden of proof upon Cinelli to establish prejudice, once he had established a *prima facie* case that a constitutional violation had occurred.

The petitioners argue that the First Circuit decision would "inevitably distort the substantive definition of what conduct constitutes a violation of the Sixth Amendment." This position is without merit. The First Circuit held not that there was a Sixth Amendment violation, but that there existed a genuine issue of fact as to whether Cinelli suffered prejudice as a result of the police misconduct. Thus, the case should go back to the District Court for a proper determination of applicable facts. In the instant matter, if a fact finder were to determine that the Commonwealth learned of Cinelli's intention to put forth an alibi defense as a result of the misconduct, then such a factual determination may well warrant a finding of prejudice. However, the First Circuit was reviewing a summary judgment decision and thus only found that the District Court was in error

in finding that there was genuine issue of fact. Such a ruling does not warrant this Court's review.

The petitioners contention that there exists a conflict among the Circuits regarding the rule as to the burden of proof in establishing prejudice in Sixth Amendment claims, would however appear to have merit. A review of numerous Circuit decisions indeed indicates that the First Circuit decision in shifting the burden of proof is not in accordance with decisions by the Second, Sixth, Eighth and Ninth Circuits. See United States v. Dien, 609 F.2d 1038 (2d Cir. 1979); United States v. Steele, 727 F.2d 580 (6th Cir. 1983); United States v. Irwin, 612 F.2d 1182 (8th Cir. 1980); Clutchette v. Rushen, 770 F.2d 1469 (9th Cir. 1985).

This Court in United States v. Morrison, 449 U.S. 361 (1981) did not directly address the question the burden of proof as it assumed a violation had occurred but a dismissal of the indictment was not warranted due to the absence of prejudice. Thus, it would appear that the Supreme Court has not ruled on the issue as to which party bears the burden of proof to establish prejudice and a Sixth Amendment violation is established.

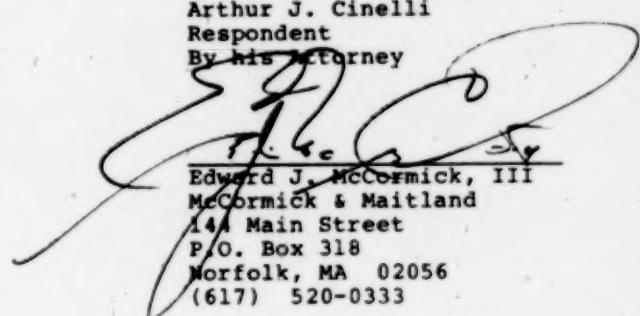
However, this Court should not grant the writ as judicial economy would best be served by allowing the case to proceed to trial which factual determination may well dictate that the issue be moot.

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McCORMICK & MAITLAND
ONE-FORTY-FOUR
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MAIN STREET
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P.O. BOX 318
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AREA CODE 617
520-0333

It is therefore respectfully submitted that the petition
for a writ of certiorari should be denied.

Respectfully Submitted
Arthur J. Cinelli
Respondent
By his Attorney



Edward J. McCormick, III
McCormick & Maitland
144 Main Street
P.O. Box 318
Norfolk, MA 02056
(617) 520-0333

LAW OFFICES
McCORMICK & MAITLAND
ONE-FORTY-FOUR
MAIN STREET
COUNTRY CROSSING
P.O. BOX 318
NORFOLK, MA 02056
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520-0333